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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

Respondents.

MEMORANDUM FOR THE STATE OF OREGON AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The State of Oregon has in existence, under construction and in the planning stage, many hydroelectric projects both on and within its borders. The principal rivers involved are the Columbia, Snake, Willamette, Rogue and Deschutes Rivers and their tributaries.

All of these rivers and a large number of less important rivers with hydroelectric projects on them support substantial populations of anadromous and resident food and game fish. These fish support a vital segment of the State's economy not only from the aspect of the com-

mercial fishing industry but as an important adjunct to the third largest industry in the State, tourism.

All of the hydroelectric projects on these rivers require some sort of fish protective facilities from ladders to hatcheries to mitigate the damage caused by the projects to the fishery resource. Therefore, any decision of the courts involving such fish protective facilities, particularly the decision in *Pacific Power & Light Co., et al. v. Federal Power Commission*, 333 Fed.2d 689, is of utmost interest to the people of the State of Oregon.

ARGUMENT

The State of Oregon takes the position that the action of the Federal Power Commission in apportioning the costs of operation and maintenance of the fish hatchery at the Iron Gate project, 80 percent to the licensee and 20 percent to the California Department of Fish and Game, is without statutory authority. If the decision of the Court of Appeals for the Ninth Circuit is allowed to stand, a dangerous precedent will be established which will, in effect, allow the Federal Power Commission to order the State governments to subsidize federally licensed hydroelectric projects. This is not the intent of Congress, but this is in actuality what is taking place when the obscuring veil of sophistry is lifted.

The court said the Commission did not order the California Department of Fish and Game to pay 20 percent of cost of operation and maintenance of the hatchery, (page 17A, petitioner's brief) but in the very next para-

graph quotes the determination of the Commission as saying "To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions." *Apportioning 20 percent of the operating costs to the Department will more nearly result in restoring the status quo.*" (emphasis supplied)

On page 35A of the brief of Department of Fish and Game, we find the following language in the Opinion of the Federal Power Commission: "Although we are unable to order the State of California to assume the remaining 20 percent of the operation and maintenance expenses, we believe that the apportionment of costs as herein set out is reasonable and will be so considered by the State agency. Apportionment of the costs in this manner also will provide the State with a financial incentive to assure economy of operation of the fishery facilities."

It appears to the State of Oregon that what the Commission says it cannot do it goes right ahead and does.

Oregon contends that any facilities to pass fish, or those substituted for passage (i.e. hatcheries) come under not only Section 10(a) of the Federal Power Act, but under Section 18 of the Act where Congress provided specifically that "The Commission shall require the construction, maintenance, and operation by a licensee *at its own expense* of such lights and signals as may be directed by the Secretary of the Department in which

the Coast Guard is operating *and such fishways* as may be prescribed by the Secretary of Commerce. (emphasis supplied)

CONCLUSION

Wherefore the State of Oregon, as *amicus curiae*, in the firm belief that Congress intended that licensees under the Federal Power Act should construct fish facilities at their own expense as set forth in Section 18 of the Act, respectfully requests that the Writ of Certorari petitioned for by the Department of Fish and Game of the State of California be granted.

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